

Proprietary Procurements

Chad Riley
Assistant General Counsel
Texas Comptroller of Public Accounts

Roadmap

- **Proprietary Definition / Proprietary vs. Sole Source**
- **Concept/Big Picture**
- **Texas Gov't Code § 2155.067**
- **Justification**
- **Common Mistakes**
- **Crypt Examples**
- **Best Value**

Proprietary

- What does it mean?
- Defined in SPD rules (34 TAC §20.25(b)(44)):

“Products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law. A product or service is proprietary if it has a **distinctive feature or characteristic** which is not shared or provided by competing or similar products or services.”

Proprietary versus Sole Source

- **Proprietary = one maker; Sole Source = one supplier.**
- It is not only possible, but **LIKELY** that proprietary products can be competitively obtained.

Proprietary Purchase

Contract entered into without a competitive process, based on a justification that only one known source exists.

Big Picture

- **Government Procurement = Fair and Open Competition**
- **Proprietary Purchase = No competition**

Back to Basics

- **WHAT DOES THE STATUTE SAY?**
- Tex. Gov't Code §2155.067(a):
 - If, after review under Section 2155.066, the [comptroller] finds that specifications and conditions of a purchase request describe a product that is proprietary to one vendor **and** do not permit an equivalent product to be supplied, the [comptroller] shall require the requesting state agency to justify in writing the specifications or conditions.

PROPRIETARY PURCHASE JUSTIFICATION

I. State what commodity item(s) or services your agency proposes to purchase, and give general background regarding the agency's need for and planned use.

II. Provide a clear statement why the agency specifications for the product are written as they are, and why those specifications are necessary to accomplish the agency's goal for the procurement.

III. Explain clearly why any competing products do not meet the needs of the agency for the specific commodity. Give examples of the technical, practical, or operational issues that would occur if competing products are selected.

Who signs?

- Signature – **NOTE:** statute requires signature by the Executive Head or Presiding Officer of a state agency, or their designee.
- If anyone other than the ED or Presiding Officer of the agency will sign the submission, the agency shall have the appropriate signed delegation available, and shall provide that delegation letter to SPD upon request.

Posting

- **Posting** – You must post a proprietary purchase solicitation in ESBD for the appropriate period.
- Why? **IN CASE YOU'RE WRONG** and some other provider can meet the specification. There's no exemption from 2155.083 (the ESBD posting requirement) and if you don't meet the posting time requirements of that section your procurement is **VOID** (§2155.083(j)).

Remember...

- **Delegation** – Your agency still needs statutory, rule, or delegation from SPD to perform the procurement.

Common Mistakes

- Not discussing the SPECIFICATIONS like the statute requires.
- Focusing on the product or service your end users “want” to buy.
- Failing to discuss alternative products at all.
- Failing either to have the correct person sign, or to document that the signatory has authority.
- Relying on the vendor to “prove” that their product is proprietary.
- Failing to understand the difference between proprietary and sole-source.

Examples from the Crypt

- “Our professionals have identified [vendor’s product] as the most durable, safe, and efficient system of its kind.”
- “These items are essential to continue [the work the federal government is joining us in funding and performing].”
- “[The vendor] has claimed their technology is proprietary and we agree.”
- “[Vendor] is the exclusive patent holder of US Patents [X, Y and Z]. No other manufacturer can legally produce [the product] with the same properties.”

More fun examples

- “[Our agency] has performed research [on these products]. The manufacturer can provide [a range of products] that will enable [our agency] to [meet our statutory requirement].”
- “Our staff tested [these products] against others, and only [the identified products] that passed our rigorous qualification process were placed on the agency’s approved products list.” We can only buy products on our approved products list, therefore these products are proprietary.
- This is the only vendor the feds will let us spend this money with.
- This vendor is our incumbent and only their products will work with the equipment we already have.

Best Value

Price and Specification = most important, but may consider:

- (1) installation costs;
- (2) life cycle costs;
- (3) the quality and reliability of the goods and services;
- (4) the delivery terms;
- (5) past performance
- (6) the cost of any employee training associated with a purchase;
- (7) the effect of a purchase on agency productivity;
- (8) the vendor's anticipated economic impact to the state; and
- (9) **other factors relevant to determining the best value for the state**

In summary

- Focus on the specifications – why proprietary?
- Make sure to document the processes that resulted in the specs.
- Plan ahead to make sure the signatory is the correct person to sign and has authorization.
- **In general, don't just listen to your end user's or vendor's assertions about the "uniqueness" of a product – DO YOUR HOMEWORK.**

The End?

